

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE INFORMAL ADOPTION)
OF GUIDELINES TO GOVERN NEGOTIATIONS,)
MEDIATION, AND APPROVAL OF AGREEMENTS) PSC DOCKET NO. 96-172
CONDUCTED PURSUANT TO THE TELECOMMUNI-)
CATIONS ACT OF 1996, PUBLIC LAW 104-104)
(ADOPTED JULY 23, 1996))

ORDER NO. 5683

This 27th day of March, 2001, the Commission determines and Orders the following:

I. BACKGROUND

1. In July 1996, this Commission adopted "Guidelines for Negotiations, Mediation, Arbitration, and Approval of Agreements Between Local Exchange Telecommunications Carriers." See PSC Order No. 4245 (July 23, 1996) (the "Guidelines"). The impetus for the Guidelines was the-then recent enactment of the Telecommunications Act of 1996, with its use of interconnection agreements as the vehicles to open the local exchange telecommunications market to competition. See 47 U.S.C. §§ 251 & 252. The purpose of these Guidelines was to provide a procedural map which the incumbent local exchange carrier, competitive local exchange carriers ("CLECs"), and the Commission could follow in implementing that new regime. As such, the Guidelines attempt to provide a "soup to nuts" menu of procedural rules to be applied in the negotiation, mediation, arbitration, and review processes envisioned by section 252. Since 1996, this Commission has reviewed and approved a large number of interconnection agreements

negotiated between the incumbent carrier and its new competitors. Far less frequently, the Commission has been asked to arbitrate disputed terms and approve, or reject, the resulting contract with its partially arbitrated and partially negotiated terms. By this Order, the Commission makes minor revisions to two of the Guidelines. The revisions change the means of disseminating notice that the Commission has begun a proceeding to review a negotiated or arbitrated interconnection agreement.

**B. REVISIONS TO NOTICE PROCEDURES IN GUIDELINE 31
(NEGOTIATED AGREEMENTS)**

2. In original Guideline 31, the Commission set forth a procedure for carriers to notify potentially interested persons when the carriers submitted a negotiated interconnection agreement for Commission approval. Currently, Guideline 31 requires the submitting carriers to publish notice of such filing in a newspaper, provide notice by facsimile and mail to each entity included on the service list in PSC Regulation Docket No. 45, and to send, by facsimile and mail, a notice to all entities holding certificates to provide local exchange telecommunications services within this State. The notices inform interested persons and entities of the opportunity to file (within twenty days) comments expressing their views about whether the agreement should be approved or rejected.

3. Staff reports that the manner of providing notice dictated by Guideline 31 has now become burdensome to submitting carriers. There has been, and continues to be, a steady flow of negotiated interconnection agreements submitted for review. At the same time,

the number of carriers that hold certificates to provide local exchange service has grown, and also continues to increase. Consequently, with the filing of each new agreement, the submitting carriers must not only bear the still relatively-high cost of newspaper publication but also send more and more notices, first by facsimile and then by mail, to CLECs. And, on the other side, experience over the last four years suggests some reason to doubt whether the notice procedures dictated by Guideline 31 remain an effective means to solicit input to help the Commission in its review of such negotiated contracts. First, several of the participants included on the service list in PSC Regulation Docket No. 45 have receded from being active "players" in the current Delaware local exchange telecommunications market. And, more importantly, in almost every proceeding involving the submission of a negotiated agreement, Staff has been the only entity to submit comments. Despite the receipt of direct notice, in almost all instances, neither the entities participating in PSC Regulation Docket No. 45 nor other certificated CLECs have seen the need to file comments. This history of silence is one factor that must be weighed against continuing a process which requires submitting carriers to expend more and more time, and resources, in sending apparently mostly-unheeded notices.

4. Because of the above experiences, the Commission has now decided to revise the manner of broadcasting notice under Guideline 31. The Commission will no longer require the submitting carriers to publish a notice in a newspaper and to also send, by facsimile and mail, direct notices to a large number of entities. Rather,

Guideline 31 is now changed to allow, in most instances, the Commission Staff to post the required notice on the Commission's Internet website. Unless the Commission Staff directs additional dissemination, the submitted carriers will not be obligated to provide any further notice. The Commission believes that this procedure of Internet website posting may be just as effective in providing notice than the procedures for notice required by present Guideline 31. First, the large number of CLECs with administrative offices in other states may find it easier to monitor filings in Delaware by consulting an Internet website than being forced to search for notices in the legal classified section of a local newspaper. Second, entities large and small might find it more convenient to keep abreast of filings by periodically reviewing a website rather than being forced to remain alert for form written notices which might remain hidden in a pile of undistributed facsimiles or mail. In fact, if an entity is really interested in monitoring what agreements have been submitted in Delaware, it can easily set up an internal procedure to simply review each week the notices posted on the Commission's Internet website.

5. This website-only posting method of providing notice will be applicable only in the cases of: (a) a negotiated interconnection agreement submitted for approval; and (b) an agreement submitted for filing after being adopted or constructed under the "pick and choose" provisions of 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809. In addition, the new Guideline 31 empowers the Commission Staff to require the submitting carriers to undertake other, additional forms of dissemination (including newspaper publication of direct notice to

certain persons, entities, or carriers) if Staff believes that, in the context of the particular application, wider dissemination is needed to ensure that interested persons or entities have an opportunity to comment.

6. The new Guideline 31 will read as set forth in Exhibit "A."

**C. REVISIONS TO NOTICE PROCEDURES IN GUIDELINE 38
(ARBITRATED AGREEMENTS)**

7. Guideline 38 provides directions to a submitting carrier concerning the notice it must provide when a carrier seeks to have the Commission approve an agreement derived, in whole or in part, from arbitration. To a large extent, the method of providing notice under Guideline 38 tracks the procedures set forth in Guideline 31. The Commission now makes a slight revision to Guideline 38. The change deletes the requirement that notice be provided to the entities included on the service list in PSC Regulation Docket No. 45. As explained above, the Commission doubts whether the entities on that list continue to reflect those carriers actually interested in the Delaware local exchange market. Instead, the Commission will replace that requirement with one which directs that the form of notice required by Guideline 38 be posted on the Commission's Internet website. While making this particular substitution, the Commission will not, at this time, alter the other requirements for providing notice and, hence, will not move in the arbitrated agreement context to a website-only notice. So far, arbitrated agreements have been the exception in the interconnection agreement regime. Given the small number of such proceedings, it would not appear burdensome to

continue to require the present notice procedures, with the substitution noted above. Moreover, under the procedure crafted by the Guidelines, the Commission does not directly enter the underlying arbitration award. Rather, the Commission considers the substantive terms of the arbitrator's decision when it sits to approve or reject the resulting arbitrated agreement. In such proceeding, it is important that the widest variety of interests be afforded the opportunity to comment within very short time frames. Given that, the Commission - at least for now - believes that more extensive notice procedures set forth in Guideline 38 should be retained for arbitrated agreements.

8. The new Guideline 38 will read as set forth in Exhibit "A."

D. ADOPTION OF THE PROCEDURAL CHANGES WITH OPPORTUNITY FOR RECONSIDERATION

9. The Commission has been granted the authority to promulgate procedural rules for implementing the interconnection agreement process created by 47 U.S.C. §§ 251 & 252. See 26 Del. C. § 703(4). In addition, in promulgating such rules, the Commission need not adhere to the formal publication and comment requirements of the Administrative Procedures Act. See 26 Del. C. § 703(4). See also 29 Del. C. §§ 10113(b)(2) (rules of practice used by agency exempted from procedural requirements and may be adopted informally). In 1996, the Commission solicited comments from interested persons on proposed drafts before adopting the final version of the Guidelines. In this matter, the Commission decides, given the nature of the modifications being made, to follow a differing course. The Commission will adopt

the proposed changes to Guidelines 31 and 38 now, but defer the effective date of such changes until May 10, 2001. Until April 20, 2001, any interested person or entity may file comments about the proposed changes. If, in light of those submissions, the Commission determines that it took a wrong turn in making the changes, then the Commission can, prior to the effective date, revoke this Order and reconsider the revisions. On the other hand, if no comments are received, or if the comments do not call into question the revisions, then the revised Guidelines 31 and 38 will become effective on May 10, 2001, without any further action by the Commission.

Now, therefore, **IT IS ORDERED:**

1. That Guidelines 31 and 38 of the Commission's "Guidelines for Negotiations, Mediation, Arbitration, and Approval of Agreements Between Local Exchange Telecommunications Carriers" (adopted in PSC Order No. 4245 (July 23, 1996), are hereby revised and amended to read as set forth in Exhibit "A." Such revisions shall become effective May 10, 2001, unless the Commission, before such date, determines to rescind this Order and reconsider the revisions.

2. That the Secretary shall forthwith send, by United States mail, a copy of this Order to Verizon Delaware Inc., and to the next ten largest entities holding Certificates of Public Convenience and Necessity to provide local exchange telecommunications services in this State. Those ten entities shall be determined by reference to the gross intrastate revenues reported on the last-filed annual report required by 26 Del. C. § 115. In addition, the Secretary shall post a

copy of this Order on the Commission's Internet website with a prominent notice indicating that the Commission has revised Guidelines 31 and 38 of its Guidelines for reviewing interconnection agreements under 47 U.S.C. § 252(e).

3. That any interested person or entity may file comments concerning the revisions set forth in Exhibit "A." Such comments must be filed with the Commission at its Dover office on, or before, Friday, April 20, 2001. The Commission specifically reserves the right to reconsider the right to rescind the adoption of these revised Guidelines and reconsider the adoption of the revisions in light of the comments received. In the absence of any Order rescinding this Order and setting the revisions for reconsideration, the revisions set forth in Exhibit "A" will become effective on May 10, 2001.

4. Unless the Commission shall rescind the adoption of this Order, the Secretary shall send a copy of this Order to the Delaware Registrar of Regulations for publication in the May, 2001 volume of the Delaware Register of Regulations.

5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Robert J. McMahon
Chairman

/s/ Joshua M. Twilley
Vice Chairman

PSC Docket No. 96-172, Order No. 5683 Cont'd.

/s/ Arnetta McRae
Commissioner

/s/ Donald J. Puglisi
Commissioner

/s/ John R. McClelland
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

EXHIBIT “A”

REVISIONS TO

“GUIDELINES FOR NEGOTIATIONS, MEDIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS BETWEEN LOCAL EXCHANGE TELECOMMUNICATIONS CARRIERS”

...

31. Within ten days after the filing of the agreement, the Commission shall provide notice of the filing of the agreement. Such notice shall indicate that any person may file with the Commission and serve upon the submitting carriers by a date certain, twenty days after publication of the notice, comments (with supporting documentation) concerning approval or rejection of the agreement. Such notice shall be posted on the Commission’s Internet website to be accessed through a home page heading entitled “Public Notices of Telecommunications Interconnection Agreements Submitted for Approval.” The notice to the submitted agreement shall be maintained on the Commission’s website for thirty days. The Commission Staff, at its discretion, may direct the submitted carriers to disseminate such notice by other, additional means, such as by newspaper publication or by direct transmission, by facsimile, courier, or mail, to particular entities or persons.

...

38. On the same day of the filing of the agreement, the carriers shall give notice of the filing of the agreement. Such notice shall inform interested parties that they may file with the Commission written comments accompanied with supporting documentation concerning the agreement within ten days after the date of the public notice. The notice shall also include the date, time, and place, when the Commission will conduct a public proceeding to approve or reject the tendered agreement. Such notice shall be: (1) published in a newspaper of state-wide circulation; and (2) sent by facsimile and United States mail to each other entity that then holds a Certificate of Public Convenience and Necessity to provide local exchange telecommunications service in Delaware. In addition, on the same date, the Commission shall post the notice on the Commission’s Internet website to be accessed through a heading on the home page entitled “Public Notices of Telecommunications Interconnection Agreements Submitted for Approval.” The notice for the agreement shall be maintained on the Commission’s website for twenty days.